IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 091015

RONNIE EUGENE FULLWOOD,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

ASSIGNMENTS OF ERROR 4

QUESTIONS PRESENTED 5

STATEMENT OF FACTS 5

ARGUMENT 11

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT DID NOT ERR BY REFUSING TO DISMISS ONE OF THE TWO INDICTMENTS. 11

II. THE TRIAL COURT CORRECTLY HELD THAT THE OFFENSES OCCURRED UPON PUBLIC PROPERTY OR PROPERTY OPEN TO PUBLIC USE UNDER CODE § 18.2-255.2. 23

CONCLUSION 26

CERTIFICATE OF TRANSMISSION AND SERVICE 27

TABLE OF AUTHORITIES

Page

Cases

Brown v. Ohio, 432 U.S. 161 (1977)..... 12

Cartwright v. Commonwealth, 223 Va. 368,
288 S.E.2d 491 (1982) 14

Commonwealth v. Burns, 240 Va. 171,
395 S.E.2d 456 (1990) 16, 24

Commonwealth v. Diaz, 266 Va. 260, 585 S.E.2d 552 (2003) 15

Commonwealth v. Rabb, 431 Mass. 123
725 N.E.2d 1036 (2000) 21

Conyers v. Martial Arts World, 273 Va. 96,
639 S.E.2d 174 (2007) 13

De'Armond v. Commonwealth, 51 Va. App. 26,
654 S.E.2d 317 (2007) 12, 14

Educational Books, Inc. v. Commonwealth, 228 Va. 392,
323 S.E.2d 84 (1984) 13

Fullwood v. Commonwealth, 54 Va. App. 153,
676 S.E.2d 348 (2009) 4

Jordan v. Commonwealth, 2 Va. App. 590,
347 S.E.2d 152, 3 Va. Law
Rep. 132 (1986) 12

Kelsoe v. Commonwealth, 226 Va. 197,
308 S.E.2d 104 (1983) 13

Lane v. Commonwealth, 51 Va. App. 565,
659 S.E.2d 553 (2008) 12, 20, 21, 22

Martin v. Commonwealth, Record No. 1484-03-1
(Ct. of App. March 23, 2004) 19

North Carolina v. Pearce, 395 U.S. 711 (1969)..... 12

Peake v. Commonwealth, 46 Va. App. 35,
614 S.E.2d 672 (2005) 20, 22

Shears v. Commonwealth, 23 Va. App. 394,
477 S.E.2d 309 (1996) 12, 22

Smith v. Commonwealth, 26 Va. App. 620,
496 S.E.2d 117 (1998) 3, 23, 24, 25

Toliver v. Commonwealth, 38 Va. App. 27,
561 S.E.2d 743 (2002) 18, 19

United States v. Johnson, 529 U.S. 53 (2000) 14

Vollin v. Arlington County Electoral Board, 216 Va. 674,
222 S.E.2d 793 (1976) 15

Waldrop v. Commonwealth, 255 Va. 210,
495 S.E.2d 822 (1998) 14

Wooten v. Commonwealth, 235 Va. 89,
368 S.E.2d 693 (1988) 17, 18

Statutes

Section 18.2-248, Code of Virginia 21

Section 18.2-255.2, Code of Virginia ..... passim

Section 18.2-255.2(A)(ii), Code of Virginia 2, 23

Section 18.2-255.2(B), Code of Virginia 4, 17

Section 18.2-256, Code of Virginia 18

Section 18.2-374, Code of Virginia 13

Section 54.1-3448, Code of Virginia 14

Other Authorities

Drug Control Act (§ 54.1-3400 *et seq.*) 16

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STATEMENT OF THE CASE

In this case, the Court is asked to consider whether the Court of Appeals of Virginia correctly affirmed the trial court's denial of Ronnie Eugene Fullwood's motion to dismiss one of the two charges brought against him for violations of Virginia Code § 18.2-255.2, where the evidence showed he distributed or possessed with the intent to

distribute within 1,000 feet of school property both cocaine and marijuana.

The Court is also asked to consider whether the Court of Appeals correctly affirmed the trial court's denial of Fullwood's motion to strike because the offenses occurred on public property or property open to public use as contemplated in § 18.2-255.2(A)(ii).

At the outset of Fullwood's June 25, 2007, bench trial, the defendant moved to dismiss one of the two charges against him for violating § 18.2-255.2, arguing that possession of more than one substance with the intent to distribute within 1,000 feet of a school constituted only one offense because the possession stemmed from the same incident or transaction. (App. 4-5). Therefore, charging Fullwood twice supposedly placed him in double jeopardy. (App. 6). The trial court denied the motion on the grounds that the statute contemplates multiple offenses because it distinguishes between a second or subsequent conviction for possession of a controlled substance within 1,000 feet of school property, and it distinguishes between marijuana and other drugs. (App. 6-7).

At the conclusion of the Commonwealth's evidence, Fullwood renewed his motion. The court denied the motion, stating that the

facts established more than one offense. (App. 71-72, 74). Fullwood then moved to strike both charges arguing that he was on private property, which is not within the purview of § 18.2-255.2. (App. 74-75). Relying on Smith v. Commonwealth, 26 Va. App. 620, 496 S.E.2d 117 (1998), the trial court denied the motion. (App. 86-87).

The court also denied Fullwood's renewed motions to strike at the conclusion of all the evidence. (App. 101-02, 108, 112). The court found Fullwood guilty of two counts of possessing drugs with the intent to distribute, within 1,000 feet of a school in violation of § 18.2-255.2.[1] (App. 115, 118-21).

At sentencing, Fullwood renewed his motion to dismiss one of the convictions for violating § 18.2-255.2, arguing again that his possession with intent to distribute both marijuana and cocaine constituted only one violation of the statute. (App. 125-28). The trial court denied the motion and sentenced Fullwood to five years imprisonment for distributing or possessing with the intent to distribute marijuana within 1,000 feet of a school, with all suspended. (App. 132, 133, 136-38). For distributing or possessing with the

[1] Fullwood was also convicted of several other drug and gun charges, but those are not relevant to the issues granted on appeal by this Court.

intent to distribute cocaine within 1,000 feet of a school, the court sentenced the defendant to five years imprisonment, with four years suspended, thereby imposing the mandatory minimum term of one year imprisonment for a second offense under § 18.2-255.2(B). (App. 133-34, 139-41).

In a published opinion issued on May 12, 2009, the Court of Appeals affirmed the judgment of the circuit court. Fullwood v. Commonwealth, 54 Va. App. 153, 676 S.E.2d 348 (2009). (App. 144-51).

This Court awarded Fullwood an appeal on September 2, 2009.

ASSIGNMENTS OF ERROR

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF FULLWOOD'S MOTION TO DISMISS ONE OF THE TWO COUNTS OF POSSESSION WITH INTENT TO DISTRIBUTE CONTROLLED SUBSTANCES WITHIN 1,000 FEET OF SCHOOL PROPERTY.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF FULLWOOD'S MOTION TO STRIKE BOTH CHARGES UNDER VIRGINIA CODE § 18.2-255.2, WHERE FULLWOOD WAS IN A PRIVATE APARTMENT COMPLEX POSTED "NO TRESPASSING" AND THUS NOT ON "PUBLIC

PROPERTY OR ANY PROPERTY OPEN TO PUBLIC USE," AS REQUIRED FOR A CONVICTION UNDER THE STATUTE.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF FULLWOOD'S MOTION TO DISMISS ONE OF THE TWO INDICTMENTS FOR DISTRIBUTING OR POSSESSING WITH THE INTENT TO DISTRIBUTE CONTROLLED SUBSTANCES WITHIN 1,000 FEET OF SCHOOL PROPERTY IN VIOLATION OF CODE § 18.2-255.2? (Assignment of Error I).

II. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF FULLWOOD'S MOTION TO STRIKE BOTH CHARGES UNDER CODE § 18.2-255.2 WHERE FULLWOOD ARGUED HE WAS ON PRIVATE PROPERTY AND NOT PUBLIC PROPERTY OR ANY PROPERTY OPEN TO PUBLIC USE? (Assignment of Error II).

STATEMENT OF FACTS

Newport News Police Detective Ara Hahn testified that on January 20, 2006, he and Officer J.S. Turlington were conducting surveillance at the 4700 block of Rochester Court in the Newsome Part Apartments complex, where police suspected operation of an

open-air drug market. (App. 8-9). The apartment complex was posted “No Trespassing” and there was a letter on file with the City to enforce that. (App. 10, 15, 51).

While positioned in a vacant apartment overlooking the east side parking lot, Hahn observed the defendant pull into the parking lot and park his Chrysler Fifth Avenue car near a dumpster. (App. 10-11). Fullwood got out of his car, but remained in the area talking to several people who were loitering near the apartments. (App. 11).

Around 3:30 p.m., Hahn observed a tan Ford Ranger pickup truck pull into the parking lot. (Id.). Hahn saw the defendant approach the driver, who had remained in the truck, and, after a brief conversation, take what appeared to be currency from the driver. (App. 11, 16). Hahn testified at trial that Fullwood returned to the Chrysler, opened the trunk, and took a small item out of a backpack. Fullwood walked back to the truck with his right hand clenched and, without stopping, dropped an item in the driver’s hand, which was open with the palm side facing up. (App. 11-13, 18-19). After the transaction, Fullwood kept walking and entered the apartment directly in front of the parked truck. (App. 12, 19).

Hahn testified that when the Ford truck began to pull out of the parking lot, he radioed the surrounding police units that were waiting down the road. (App. 12). Sergeant J.V. Polak stopped the driver of the truck and recovered from him a clear plastic bag that contained suspected marijuana. (App. 23-24).

Later that afternoon, Hahn observed Fullwood engage in another suspected sale. Hahn saw a vehicle pull into the parking lot and the passenger, who was wearing a Georgetown Hoyas jacket, got out and approached the defendant. (App. 14). After a brief conversation, the two men walked over to the trunk of Fullwood's car. Hahn saw Fullwood reach into the backpack in the trunk, at which point Hahn could see that the backpack contained a large plastic bag that appeared to contain an off-white substance. (Id.). Hahn witnessed the defendant retrieve something from the plastic bag, and then he saw the defendant make a hand-to-hand exchange with the other individual. (App. 14-16). There were no officers available to intercept the suspected buyer and determine what Fullwood sold him. (App. 14).

Officer Polak testified that following the second suspected transaction, he returned to the apartment complex and placed the

defendant under arrest and read him his rights. (App. 21-22, 25). As Polak escorted Fullwood back to the Chrysler, Fullwood said there was a gun in the trunk. (App. 25). Polak responded that he also suspected marijuana in the trunk, and Fullwood admitted he had about two ounces of marijuana in the trunk. (Id.).

Polak testified that after the defendant provided him with the key to the Chrysler, he opened the trunk and found a Ruger P95DC semiautomatic handgun with a magazine containing 15 rounds of live ammunition lying on top of the spare tire. (App. 25, 31).

Polak also found the black backpack in the trunk that Detective Hahn had seen during his surveillance of Fullwood. (App. 25). Polak found a clear plastic bag that contained 47 individually wrapped chunks of cocaine inside the front pocket of the backpack. (App. 28-29, 33, 117). From the same pocket, Polak also recovered two small pieces of individually wrapped crack cocaine. (App. 29, 34, 117). At the bottom of the pocket, Polak found another clear plastic bag with a large chunk of crack cocaine that had not been packaged into smaller amounts. (App. 29, 34-35, 117). Polak stated the backpack pocket also contained two clear plastic bags with 40 individually wrapped bags of marijuana inside. (App. 29, 35-36, 117). Polak also found

"multiple clear plastic bags inside and outside of two yellow sandwich bag boxes that were in the main compartment [of the backpack]." (App. 38). Some of them had marijuana stems in them. (App. 38-39).

After Polak told Fullwood that he had found crack cocaine in his vehicle, Fullwood admitted that he had three pieces of crack in his pants pocket, which Polak then recovered. (App. 29-30, 35, 117). Polak also found $203 and a cellular phone in the defendant's pockets. (App. 30-31).

Detective Andy Matthews interviewed Fullwood following his arrest and waiver of his right to an attorney. (App. 52-53). The defendant told Matthews that someone he knew only as "C," who had a Jamaican accent, wore dreadlocks and was about 5'11" tall, had given him the firearm sometime between 2:00-3:00 a.m. on January 17. (App. 54-55). Fullwood said C had asked the defendant to put the firearm in the rear of his vehicle. (App. 54). Two days later, on January 19, Fullwood said he paid C $100 for two ounces of marijuana, which he intended to sell. (App. 55).

Regarding the crack cocaine, Fullwood told Matthews that he had found all of it in a metal electrical box in the 4800 block of

Marshall Avenue. (Id.). Fullwood said he had intended to exchange the cocaine with his marijuana supplier for more marijuana to sell. (App. 56).

Detective Matthews, who the parties stipulated was an expert in the field of packaging, distribution and the sale of narcotics, testified that the combined amounts of cocaine the defendant had possessed had a street value of approximately $741.80. (App. 56-57). The marijuana had a street value of approximately $460.20. (App. 57). Matthews opined that, in his expert opinion, the drugs were inconsistent with possession for personal use. (Id.).

Officer Turlington testified that he had measured the distance between where the transactions took place and the nearby elementary school. (App. 50-51). His first measurement was 574 feet and 9 inches, and his return measurement was 587 feet and 3 inches. (App. 51).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT DID NOT ERR BY REFUSING TO DISMISS ONE OF THE TWO INDICTMENTS.

Fullwood argues that the trial court violated principles of statutory construction and erred by refusing to dismiss one of two indictments charging him with violating § 18.2-255.2. The defendant contends the statute contemplates only one offense, regardless of how many different drugs the defendant may have possessed at the time of his arrest. Therefore, he contends, the trial court violated his guarantee against double jeopardy under the United States and Virginia constitutions because "there was only a single occasion or transaction in which controlled substances were held for sale or distribution." (Def. Br. at 20). Fullwood is wrong, and, as the Court of Appeals correctly held, the trial court did not err in denying his motion to dismiss one of the indictments charging a violation of § 18.2-255.2.

"The Double Jeopardy Clause of the Fifth Amendment 'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same

offense.'" Lane v. Commonwealth, 51 Va. App. 565, 576, 659 S.E.2d 553, 558 (2008) (quoting Brown v. Ohio, 432 U.S. 161, 165 (1977) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

"'The issue of multiple punishments actually arises in two contexts. First, two or more statutes . . . proscribe . . . particular conduct as criminal offenses. Second, . . . conduct may constitute more than one violation of a single criminal proscription.'" Id. (quoting Shears v. Commonwealth, 23 Va. App. 394, 400, 477 S.E.2d 309, 312 (1996) (quoting Jordan v. Commonwealth, 2 Va. App. 590, 593, 347 S.E.2d 152, 154, 3 Va. Law Rep. 132 (1986)).

> In a simultaneous prosecution, the role of the Double Jeopardy Clause is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense. The legislature retains plenary discretion to determine the appropriate unit of prosecution and to punish each violation separately. In determining the statutory unit of prosecution, the controlling factor is legislative intent. The multiple punishments prohibition, therefore, remains from start to finish wholly dependent on statutory interpretation.

De'Armond v. Commonwealth, 51 Va. App. 26, 32-33, 654 S.E.2d 317, 320 (2007) (internal citations and quotations omitted). "It is judicial punishment in excess of legislative intent which offends the double jeopardy clause." Shears, 23 Va. App. at 401, 477 S.E.2d at 312. See generally Educational Books, Inc. v. Commonwealth, 228

Va. 392, 395-96, 323 S.E.2d 84, 86 (1984) (double jeopardy not violated where defendant book store was convicted for nine violations of Code § 18.2-374; statutory language showed that legislative intent was for each sale of an obscene magazine to constitute a separate offense); Kelsoe v. Commonwealth, 226 Va. 197, 308 S.E.2d 104 (1983) (multiple punishments permissible and double jeopardy not violated because defendant committed three separate crimes by brandishing and pointing a firearm at three men standing together). Matters of statutory interpretation are pure questions of law, which this Court reviews de novo. Conyers v. Martial Arts World, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007).

Fullwood was indicted and convicted for two violations of Code § 18.2-255.2, which makes it unlawful "for any person to manufacture, sell or distribute or possess with intent to sell, give or distribute any controlled substance, imitation controlled substance or marijuana while" on school property or "upon public property or any property open to public use within 1,000 feet of [school property]."

The defendant argues that because § 18.2-255.2 is a penal statute, it must be strictly construed against the Commonwealth and in favor of him. So construed, he alleges, the statute allows for only

one conviction regardless of the fact that he possessed with the intent to distribute both cocaine, a Schedule II controlled substance under Code § 54.1-3448, and marijuana within a 1,000 feet of a school.

However, nothing in § 18.2-255.2 supports his argument. Indeed, it is "[o]nly when a 'penal statute is *unclear*' do courts apply the rule of lenity and strictly construe the statute in the criminal defendant's favor." De'Armond, 51 Va. App. at 34, 654 S.E.2d at 321 (citing Waldrop v. Commonwealth, 255 Va. 210, 214, 495 S.E.2d 822, 825 (1998) (emphasis added and footnote omitted)). "Absent ambiguity, the rule of lenity is not applicable to guide statutory interpretation." Id. (quoting United States v. Johnson, 529 U.S. 53, 59 (2000)).

Moreover, the "strictly construed" rule does not abrogate the overriding concern that "'a statute . . . should be read and applied so as to accord with the purpose intended and attain the objects desired if that may be accomplished without doing harm to its language.'" Cartwright v. Commonwealth, 223 Va. 368, 372, 288 S.E.2d 491, 493 (1982) (citation omitted).

This Court has explained the principles guiding its ascertainment of the meaning of a statute:

> Our decision here is controlled by the general principle that the ascertainment of legislative intent is the paramount object of statutory construction. The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow or strained construction. It is the intention of the lawmaker that constitutes the law. The primary object in the interpretation of a statute is to ascertain and give effect to that intention, although the construction may not be in conformity with the strict letter of the law. It has been said that legislative intent is to be gathered from words used in the statute unless a literal interpretation would lead to a manifest absurdity. The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms.

Vollin v. Arlington County Electoral Board, 216 Va. 674, 678, 222 S.E.2d 793, 797 (1976) (citation omitted). However, when a statute's language is plain and unambiguous, this Court is bound by such plain language and may not give the words a construction that effectively amounts to holding that the General Assembly did not mean what it actually said. Commonwealth v. Diaz, 266 Va. 260, 265, 585 S.E.2d 552, 554 (2003).

Because § 18.2-255.2 is clear and unambiguous, it is not subject to the rule of lenity, and the Court is bound by the plain words of the statute. So read, the statute clearly contemplates multiple offenses for possession with intent to distribute multiple drugs.

In Commonwealth v. Burns, 240 Va. 171, 395 S.E.2d 456 (1990) this Court stated the General Assembly's objective in enacting § 18.2-255.2 was to address concerns about "the aggravated nature of drug transactions involving children. The aggravating factor, *viz.*, ***a drug transaction*** occurring within 1,000 feet of a school, is incorporated into the offense." Id. at 176, 395 S.E.2d at 459 (emphasis added).

Thus, as recognized in Burns, the General Assembly intended for § 18.2-255.2 to punish every drug transaction within 1,000 feet of a school. The defendant's position that there can be only one violation of § 18.2-255.2, no matter how many different substances a defendant might possess with the intent to distribute, would bring about an absurd result and is contrary to the clear, unambiguous intent of the legislature. Indeed, by classifying controlled substances in the Drug Control Act (§ 54.1-3400 *et seq.*), the General Assembly created a hierarchy of the most harmful controlled substances. It would be absurd to conclude, as Fullwood asserts, that the General Assembly meant to punish for a transaction involving marijuana, which is not even listed as a controlled substance in the Drug Control Act, but did not intend to punish for a transaction involving cocaine, a

Schedule II drug, simply because the seller possessed both substances at the same time.

Indeed, as the Court of Appeals recognized, the gravamen of the offense under § 18.2-255.2 is not, as Fullwood argues, the possession of drugs within a 1,000 feet of school property. Rather, the gravamen of the offense is the manufacturing, sale, distribution, or possession with the intent to distribute "any controlled substance, imitation controlled substance or marijuana" within 1,000 feet of school property. (Emphasis added). The fact that the plain language of the statute makes possession of each illegal substance a separate offense is further evidenced by the enhanced punishment provision in the form of a mandatory minimum sentence for a second or subsequent offense involving a Schedule I, II or III controlled substance or more than one-half ounce of marijuana found in 18.2-255.2(B).

In Wooten v. Commonwealth, 235 Va. 89, 368 S.E.2d 693 (1988), this Court rejected the defendant's argument, similar to the one raised by Fullwood, that he could be guilty of only one offense where there was a single conspiracy, albeit to commit several drug offenses involving marijuana, cocaine and preludin. This Court held

that "a single agreement can form the basis for multiple violations of § 18.2-256. Otherwise, criminals would be encouraged to plot a number of drug-related crimes simultaneously, because only one conspiracy would exist. This could not have been the intention of the General Assembly." Id. at 93, 368 S.E.2d at 695.

The same is certainly true of § 18.2-255.2. Under Fullwood's theory, however, he could have made unlimited sales of multiple drugs, but as long as he did so during a defined time frame, he could be guilty of only one violation of § 18.2-255.2. Clearly, the legislature did not intend such an absurd result.

Fullwood's reliance on Toliver v. Commonwealth, 38 Va. App. 27, 561 S.E.2d 743 (2002), for the proposition that there can only be one violation of § 18.2-255.2 for possession of multiple substances is misplaced. Toliver, who had possessed both cocaine and heroin when he was arrested, was convicted of one count of possession of a controlled substance with the intent to distribute within 1,000 feet of school property. Toliver did not address any double jeopardy issue, but considered only whether the evidence was sufficient to prove that the defendant intended to possess or distribute the drugs within 1,000 feet of school property. Considering that the defendant in Toliver was

not even charged with multiple violations of § 18.2-255.2, the Court of Appeals plainly did not decide any double jeopardy issue.

Fullwood also cites Martin v. Commonwealth, Record No. 1484-03-1 (Ct. of App. March 23, 2004), where the defendant was convicted for possession with intent to distribute cocaine within 1,000 feet of school property, and possession with intent to distribute heroin within 1,000 feet of school property. However, as in Toliver, the Court did not address the issue of multiple punishments on appeal.

In any event, and contrary to Fullwood's assertion, the facts demonstrate that there was not "only a single occasion or transaction in which controlled substances were held for sale or distribution" in this case. (Def. Br. at 20). Indeed, Fullwood's argument completely ignores the evidence that he engaged in two separate sales of two separate drugs.

The defendant was indicted for feloniously distributing or possessing with the intent to distribute marijuana within 1,000 feet of school property. (App. 1). The evidence established that Fullwood did in fact distribute marijuana to the driver of the pickup truck. That distribution constituted one incident or transaction.

Fullwood was also indicted for feloniously distributing or possessing with the intent to distribute cocaine within 1,000 feet of school property (App. 2). Detective Hahn testified that, after the first sale of marijuana to the driver of the pickup, he observed a second sale involving an individual wearing a Georgetown Hoyas jacket. (App. 16). Hahn saw the defendant and the man in the jacket walk over to the trunk of Fullwood's car, and he saw Fullwood reach into a plastic bag containing an off-white substance. Then Hahn witnessed the two engage in a hand-to-hand exchange. (App. 16-17). That was a second transaction.

Moreover, Fullwood told Detective Matthews that he intended to exchange the cocaine for more marijuana, which he could then sell. (App. 56). In other words, the defendant intended to distribute the cocaine to his marijuana supplier. Thus, in addition to the two separate transactions Detective Hahn observed, the defendant's own statements demonstrated that he had different intents regarding his possession of the marijuana and the cocaine.

In Lane, the Court of Appeals of Virginia, quoting Peake v. Commonwealth, 46 Va. App. 35, 41, 614 S.E.2d 672, 676 (2005), noted that

> [g]enerally, courts which have considered the issue [of multiple prosecutions under controlled substance statutes] have determined that separate convictions for possession of the same controlled substance [with the intent to distribute] will not violate the Double Jeopardy Clause if the possessions are sufficiently differentiated by time, location, or ***intended purpose***.

Lane, 51 Va. App. at 577, 659 S.E.2d at 558-59 (emphasis added) (additional citations omitted). "The considerations of time, location, and intended purpose 'are meant to be disjunctive, with no one determinative factor.'" Id. at 578, 659 S.E.2d at 559 (quoting Commonwealth v. Rabb, 431 Mass. 123, ___, 725 N.E.2d 1036, 1043 (2000)).

In Lane, the defendant was convicted of three counts of possession with intent to distribute a Schedule II controlled substance (oxycodone) in violation of Code § 18.2-248. On appeal, Lane argued that the three indictments should have been consolidated into one. The Court of Appeals agreed, based on its finding that the Commonwealth had failed to prove that the defendant had "three separate intents to distribute oxycodone that would support three separate convictions." Id. at 582, 659 S.E.2d at 561. "There was no evidence that the different forms of oxycodone appealed to different drug users or customers of appellant." Id. at 581, 659 S.E.2d at 560.

Unlike the facts in Lane, not only did Fullwood possess two different drugs, but in addition, the Commonwealth's evidence established he had differing intents regarding his possession of those drugs. The evidence also proved that he had different customers for the two different drugs. In other words, the evidence plainly showed that there was not just a single occasion or transaction of possession with intent to sell within 1,000 feet of a school, as Fullwood alleges.

The trial court, following principles of statutory construction, properly construed § 18.2-255.2 and refused to dismiss one of the indictments. Indeed, if multiple punishments for possession of the same drug are permissible where the evidence establishes differing intents for each possession (e.g., Lane, Shears and Peake), multiple punishments are permissible and do not violate the Double Jeopardy Clause where the evidence establishes the defendant possessed different drugs and had differing intents as to each substance. Accordingly, Fullwood's assertion is baseless that he was indicted and convicted twice for one violation of § 18.2-255.2 in violation of his guarantee against double jeopardy. The Court of Appeals, therefore, did not err by affirming the trial court's denial of Fullwood's motion to dismiss one of the two indictments against him.

II. THE TRIAL COURT CORRECTLY HELD THAT THE OFFENSES OCCURRED UPON PUBLIC PROPERTY OR PROPERTY OPEN TO PUBLIC USE UNDER CODE § 18.2-255.2.

Fullwood argues the trial court erred by denying his motion to strike both charges because it applied too broadly the statutory language "upon public property or any property open to public use" in § 18.2-255.2(A)(ii). Essentially, Fullwood argues that since the Newsome Park Apartment Complex was posted "No Trespassing" and there was a letter on file with the City to enforce the no trespassing rule, the property was not open to public use as contemplated by the statute. He contends he was on private property at the time of the offenses, and, therefore, the trial court should have granted his motion to strike. His argument is without merit.

In denying the defendant's motion to strike, the trial court relied on Smith v. Commonwealth, 26 Va. App. 620, 496 S.E.2d 117 (1998). In Smith, the Court of Appeals held that the parking lot of a 7-Eleven convenience store was "property open to public use" under the statute. The Court of Appeals noted in Smith that "[t]he meaning of the phrase "property open to public use" has never been interpreted

by an appellate court, most likely due to the relatively clear import of its language." Id. at 625, 496 S.E.2d at 119. The Court declined Smith's invitation to rule that the phrase "property open to public use" had the same meaning as "public property," because to do so would require the Court "to hold that the phrase "property open to public use" is redundant and meaningless." Id.

The Smith Court instead looked "to the intent of the legislature to define those areas where the statute does apply." Id. at 626, 496 S.E.2d at 119. Noting that drug use and distribution were "particularly destructive" to the young, the Court found that, "[i]n an attempt to contain this modern plague, both the General Assembly and Congress have increased the penalties accruing to one who sells narcotics "'[i]n such areas, where children congregate in large numbers before, during, and after school sessions.'" Id. at 626, 496 S.E.2d at 119-120 (quoting Commonwealth v. Burns, 240 Va. 171, 178, 395 S.E.2d 456, 459 (1990)) (additional citations omitted).

On the facts in Smith, the Court of Appeals held that

> [t]he convenience store outside of which defendant sold his cocaine is the type of place where school age children congregate. It is located directly across the street from a high school in the City of Virginia Beach. There is no indication in the record that that location was blocked, closed or in any way inaccessible to the public. Indeed,

> the record suggests that the participants to the drug transaction at issue had full access to the property on several occasions with no interruption from the owners of the establishment. Under these circumstances we hold that this convenience store parking lot was "property open to public use."

Smith at 626, 496 S.E.2d at 120.

The evidence in the case at bar established that the location where Fullwood was dealing marijuana and cocaine was less than 600 feet away from an elementary school. As was the case in Smith, the location was privately owned, but subject to use by all who obeyed the rules of the property owner. Further, as the trial court found, just as in Smith, there is no indication that the Newsome Park Apartments were blocked, closed or in any way inaccessible to the public. Indeed, although the apartment complex was posted no trespassing, the evidence at trial was that the officers observed people loitering about the area without any interference by the police or the property owner. Like Smith, it appears from the behavior of the participants in the drug transactions at issue that, despite the rules of the apartment complex, they had free rein to the property. Not only did the defendant park and loiter about the parking area of the complex without intervention from the police or the property owner,

but in addition, Hahn observed the drivers of the two other vehicles freely access the area.

In view of these facts, the trial court did not err by denying the defendant's motions to strike both charges. Indeed, applying the plain meaning of the words "property open to public use," the trial court correctly found that the mere fact the Newsome Park Apartment Complex had the ability to post the area "No Trespassing" did not mean that the property was not open to public use as contemplated by § 18.2-255.2. Accordingly, the Court of Appeals did not err in affirming the trial court.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals' judgment affirming Fullwood's convictions.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
Appellee herein.

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CERTIFICATE OF TRANSMISSION AND SERVICE

On October 22, 2009, the required copies of this Brief were hand-filed with this Court, and three copies were mailed to Charles E. Haden, Esquire, 1 East Queens Way, First Floor, Hampton, Virginia 23669, counsel for the appellant. An electronic copy of this brief has also been filed with this Court this day.

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